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No. 98-1725

# In the Supreme Court of the United States

ABDEL MOHAMMED RAHIM,
*Petitioner*,

v.

STATE OF TEXAS,
*Respondent*.

On Petition for Writ of Certiorari to the
Court of Appeals, Fifth District of Texas at Dallas

## RESPONDENT'S BRIEF IN OPPOSITION

JOHN CORNYN
Attorney General of Texas

ANDY TAYLOR
First Assistant Atty General

SHANE PHELPS
Deputy Attorney General

GREGORY S. COLEMAN
Solicitor General
*Counsel of Record*

PHILIP A. LIONBERGER
Assistant Solicitor General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1824

ATTORNEYS FOR RESPONDENT

## QUESTIONS PRESENTED FOR REVIEW

1. Does a conflict exist between this Court's decisions concerning a criminal defendant's right to confront his accuser under the Confrontation Clause of the Sixth Amendment and the court of appeals's decision in this case?

2. Does the court of appeals's decision conflict with decisions of United States courts of appeals on the question of whether the declaration-against-penal-interest exception to the rule against hearsay is firmly rooted for purposes of Confrontation Clause analysis?

3. Did the court of appeals properly decide that any violation of petitioner's Sixth Amendment right to confront his accuser was harmless error beyond a reasonable doubt?

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## RESPONDENT'S BRIEF IN OPPOSITION

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Respondent, the State of Texas, submits this brief in opposition to Abdel Mohammed Rahim's petition for writ of certiorari. In his petition, Rahim asks the Court to review the decision of the Fifth Court of Appeals at Dallas, Texas, affirming his conviction for capital murder. The court of appeals's decision is multifaceted and addresses the several points of error Rahim asserted in that court. Rahim's petition, however, complains only of the court of appeals's holding on the alleged violation of Rahim's Sixth Amendment right to confront his accuser at trial through cross-examination in open court.

Rahim contends that it was constitutional error to admit into evidence an unavailable accomplice's out-of-court confession that tied Rahim to the crime by identifying him as the person who hired the accomplice and another to commit murder. Concerning the alleged violation of Rahim's Sixth Amendment right of confrontation, the court of appeals did not address the merits of the

alleged constitutional violation. Instead, the court assumed, without deciding, that the alleged constitutional violation was error. Pet. App. at 5a. The court of appeals held that any error in denying that constitutional right to Rahim was harmless beyond a reasonable doubt.

The Court should deny Rahim's petition because the court of appeals's decision does not conflict with relevant decisions of this Court or decisions of the United States courts of appeals. *See* SUP. CT. R. 10(b), (c). Moreover, the court of appeals's holding that the alleged constitutional violation was harmless error is consistent with harmless error analysis under *Harrington v. California*, 395 U.S. 250 (1969), and the court of appeals correctly decided that any alleged constitutional error was harmless beyond a reasonable doubt.

## STATEMENT OF THE CASE

On December 5, 1994, Ahmed Hassan was fatally shot outside his store, Bob's Market, in the Oak Cliff area of Dallas, Texas. R. 4, 34, 251-56, 543, 841. He died from four gunshot wounds to his head, back, and left thigh, and the coroner ruled his death a homicide. R. 841. Two members of the Junior Home Boys gang, Mario Cabrera and Adolpho Vivanco, were tried and convicted for capital murder in the shooting death of Ahmed Hassan. R. 34, 326, 408, 595.

Cabrera was arrested in connection with the shooting of Hassan on December 8, 1994. Vivanco was arrested in March of 1995. On April 12, 1995, a Dallas County grand jury indicted Rahim for capital murder in death of Hassan, specifically Rahim "did . . . intentionally and knowingly cause the death of [Hassan] by employing Mario Cabrera, Tony Ramos and Adolpho Vivanco for remuneration and the promise of remuneration, to wit: $500.00 . . . to murder [Hassan], and pursuant to that employment, Mario Cabrera did intentionally and knowingly cause the death of

[Hassan] by shooting [him] with a firearm." R. 4. Rahim was then tried for capital murder.

At his trial, several witnesses were called to testify in open court. Hassan's son testified to the facts surrounding the murder of his father. R. 250-304. He witnessed the shooting and identified Cabrera as the shooter, R. 256-57, and Vivanco as being present outside the store when the shooting occurred. R. 285, 293.

David Alferez testified that on the day of Hassan's murder, he overheard Cabrera talking on the telephone outside of Bob's Market, while Vivanco stood nearby. R. 309-10, 333. Alferez overheard Cabrera say, "We're getting paid to do this. We've got to kill the owner.... I've got to let you go because we've got to do this." R. 310. Alferez saw Cabrera and Vivanco pull bandanas over their faces, which told Alferez that Cabrera and Vivanco were going to shoot, kill, or rob somebody. R. 334, 336. After leaving the store, Alferez heard shots and saw Cabrera and Vivanco run from the store and get into a car. R. 314.

Orlando Barrios testified that he had known Rahim for several years, ever since he was a little boy. R. 405, 409. He also knew Cabrera and Vivanco and was in the Junior Home Boys gang with them. R. 407-08. After the Hassan murder, he spoke to Rahim about the murder and Cabrera. R. 408-10. Rahim and Barrios discussed how they might possibly help Cabrera get less time by reducing his conviction from capital murder to murder. R. 411, 445-46. Rahim devised a story and had Barrios write it down on a piece of paper. R. 412. Rahim had Barrios write down that Cabrera murdered Hassan after the two argued over a pair of socks. R. 413. Rahim instructed Barrios to relate the story to Cabrera, and Barrios discussed the story with Cabrera over the phone. R. 413-14. Rahim also told Barrios that Vivanco had "snitched." R. 414.

Darrell Hardman testified that he knew Rahim and hung around his store on the corner of Colorado and Lancaster streets,

occasionally doing things around the store for Rahim. R. 468-69, 472. Rahim gave him food and money. R. 472. According to Hardman, they trusted each other. R. 474. Sometime before Hassan's murder, Rahim told Hardman that he wanted the owner of Bob's Market "knocked off" and offered Hardman money to kill Hassan. R. 473, 474. Hardman told Rahim that he could not do it, and Rahim asked him if he knew of anybody who could, to which Hardman replied "no." R. 473. Rahim told Hardman the reason he wanted Hassan killed was that "the guy had messed him out of some money or something." R. 474. Hardman testified that, around this same time, he saw Cabrera and Vivanco "hanging around" the store. R. 475. In June of 1995, Rahim told Hardman that he had paid "some Mexican guys" $500 to "knock off" the owner of Bob's Market. R. 477.

Later, at the end of 1995 and beginning of 1996, both Hardman and Rahim were in county jail. R. 478. They ran into each other while there and talked briefly about Hassan's murder. *Id.* Rahim told Hardman that "[h]e had beat the M.F.'s [sic] again. They didn't have any evidence on him. And he was getting ready to go back on the street." R. 478-79.

John DeJean testified that he met Rahim in the Dallas County jail sometime in January 1996. R. 523. He and Rahim talked about Hassan's murder, and Rahim asked him if he would check into whether Cabrera and Vivanco were incarcerated in the Dallas County jail. R. 523-25. Rahim told DeJean that Cabrera and Vivanco were supposed to testify at his trial. R. 525. Rahim also told DeJean that he had paid Cabrera and Vivanco $500 each "[t]o murder Hassan," and that he "did[n't] have anything to worry about because no one was around when [he] paid those guys." R. 526, 527.

Dallas County homicide detective Kenneth Penrod testified that he was present when Cabrera was arrested. R. 546-47. Cabrera had $401 on him at the time of his arrest. R. 547.

Neither Cabrera nor Vivanco testified at Rahim's trial. However, Vivanco gave a written statement to Detective Penrod on March 12, 1995.[1] R. 562, 816. This confession was admitted into evidence at Rahim's trial for the capital murder of Hassan. R. 563.

In it, Vivanco stated that one of the owners of the Super Seven store, whose name he did not know, met with him and Cabrera. R. 816. The owner offered to pay Vivanco and Cabrera each $500 to kill the owner of Bob's Market. *Id.* A few days later, Vivanco and Cabrera went to Bob's Market. *Id.* Vivanco carried the murder weapon to the scene of the crime in a paper sack. *Id.* After waiting in vain for Hassan to come out of the store, Cabrera, who had taken the gun from Vivanco, went into the store to lure Hassan outside by telling him that someone was vandalizing his van. *Id.* Vivanco waited outside. *Id.* He heard five shots and saw Cabrera running towards him. *Id.* The day after the shooting, Cabrera and Vivanco went back to Rahim's store to collect their money. *Id.* Cabrera went inside while Vivanco waited outside. *Id.* Cabrera returned and gave Vivanco $500. *Id.*

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[1] Vivanco appeared at Rahim's trial and declined to testify. R. 595-604.

## ARGUMENT

### I. THE COURT OF APPEALS'S DECISION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT AND THE COURTS OF APPEALS CONCERNING A CRIMINAL DEFENDANT'S RIGHT TO CONFRONT HIS ACCUSER UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT.

Rahim tries to coax the Court into reviewing his conviction for capital murder by manufacturing a conflict that, in reality, does not exist between the court of appeals's decision here and Confrontation Clause decisions of this Court and the United States courts of appeals. Rahim argues that his Sixth Amendment right to cross examine his accuser was violated when the trial court admitted into evidence the confession of an unavailable accomplice, Adolpho Vivanco, which was taken while Vivanco was in police custody and which inculpated Rahim. Rahim asserts that Vivanco's out-of-court confession is hearsay, that it did not fall within a firmly rooted exception to the rule against hearsay, that it did not otherwise possess particularized guarantees of trustworthiness, and that, therefore, its admission violated his constitutional rights in accordance with the Court's relevant Confrontation Clause jurisprudence. *See* Pet. for Cert. at 5, 8-17.

Rahim's argument, however, is a straw man because the court of appeals never actually decided whether Rahim's Confrontation Clause right was violated. Rather, the court assumed, without deciding, that Rahim's Sixth Amendment right to confront his accuser *was* violated. Pet. App. at 5a. From that starting point, the court performed a harmless error analysis in accordance with *Harrington*. Thus, the court of appeals's decision turns solely on the question of whether the alleged Sixth Amendment violation was harmless error beyond a reasonable doubt, not whether admission of Vivanco's confession was constitutional error for Confrontation Clause purposes.

The court of appeals held that, even if Rahim's Sixth Amendment right to confront his accuser was violated, the constitutional error nevertheless was harmless beyond a reasonable doubt and Rahim's conviction should stand. *See* Pet. App. at 6a. The court's holding is therefore a limited one that does not squarely address whether Rahim's constitutional right of confrontation was violated. Accordingly, there is no conflict between the court of appeals's decision and the relevant decisions of this Court concerning whether a Confrontation Clause violation occurred as an initial matter. *See* SUP. CT. R. 10(c). Rahim's petition should be denied.

Rahim also argues that the court of appeals "found" that Vivanco's confession fell within a firmly rooted exception to the hearsay rule and, therefore, satisfied the constitutional protection afforded by the Confrontation Clause. According to Rahim, this so-called "finding" by the court of appeals stands in direct conflict with the Court's Confrontation Clause jurisprudence and decisions of the United States courts of appeals. *See* Pet. for Cert. at 5, 7, 17-20.

The Sixth Amendment to the United States Constitution provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The Court has squarely held that "the Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right . . . made obligatory on the States by the Fourteenth Amendment." *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

In *Ohio v. Roberts*, 448 U.S. 56 (1980), the Court summarized the general framework of Confrontation Clause analysis: the veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements against an accused when (1) "the evidence falls within a firmly rooted hearsay exception" or (2) it contains "particularized guarantees of trustworthiness" such

that adversarial testing through cross-examination would be expected to add little, if anything, to the statements' reliability. *Id.* at 66.

In *Lee v. Illinois*, 476 U.S. 530 (1986), the Court rejected Illinois's argument that admission into evidence against the accused of the confession of a codefendant in a joint trial for double murder fell within a firmly rooted exception to the hearsay rule, namely the declaration-against-penal-interest exception. *Id.* at 544; *see* FED. R. EVID. 807. Referring to the declaration-against-penal-interest exception, the Court said, "That concept defines too large a class for meaningful Confrontation Clause analysis." *Lee*, 476 U.S. at 544 n.5.

The Court has stopped short of holding that all types of declarations against penal interest can be said to fall under a "firmly rooted" exception to the rule against hearsay for purposes of Confrontation Clause analysis. To date, the Court has yet to decide whether the subcategory of declarations against penal interest involving accomplices' confessions that inculpate a criminal defendant is a firmly rooted exception to the hearsay rule for purposes of *Roberts*. *See Williamson v. United States*, 512 U.S. 594, 605 (1994) (stating that "we need not decide whether the hearsay exception for declarations against interest is 'firmly rooted' for Confrontation Clause purposes").[2]

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[2] Recently, in *Lilly v. Virginia*, 119 S.Ct. 1887 (1999), a four-justice plurality of the Court decided that "accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence." *Id.* at 1899. The case was then remanded to the Virginia court "to consider in the first instance whether th[e] Sixth Amendment error was 'harmless beyond a reasonable doubt.'" *Id.* at 1901. Because the court of appeals in this case did not confront the constitutional issue, but instead based its decision on the harmless error rule, *Lilly* is inapposite to this case.

Not surprisingly, the federal courts of appeals have differed on whether such declarations against penal interest can qualify as a firmly rooted hearsay exception as a class, or whether such statements must exhibit particularized guarantees of trustworthiness to have the requisite indicia of reliability for Confrontation Clause purposes. *Compare, e.g., United States v. Keltner*, 147 F.3d 662, 671 (CA8), *cert. denied*, 119 S.Ct. 422 (1998) (firmly rooted), *with United States v. Flores*, 985 F.2d 770, 776 & n.13 (CA5 1993) (not firmly rooted).

Notwithstanding any disagreement among the United States courts of appeals concerning this issue, this case is not the vehicle for resolving any such conflict, because the court of appeals did not decide or "find" that declarations against penal interest, as a class, qualify as a firmly rooted exception to the hearsay rule for Confrontation Clause purposes. The lower court's decision is utterly silent on the issue. Because the court did not hold, one way or the other, that the declaration-against-penal-interest exception to the hearsay rule is firmly rooted for purposes of Confrontation Clause analysis, its decision does not conflict with the decisions of this Court or those of the United States courts of appeals. *See* SUP. CT. R. 10(b). Rahim's petition should be denied.

## II. THE COURT OF APPEALS PROPERLY DECIDED THAT ANY VIOLATION OF RAHIM'S SIXTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSER WAS HARMLESS ERROR BEYOND A REASONABLE DOUBT.

### A. The Court of Appeals's Harmless Error Holding Does Not Conflict with the Court's Holding in *Cruz v. New York*.

Rahim erroneously argues that the Court's holding in *Cruz v. New York*, 481 U.S. 186 (1987),"directly conflicts" with the court of appeals's holding that any alleged violation of Rahim's Sixth Amendment right of confrontation was harmless error beyond a

reasonable doubt. *Cruz* is not a harmless error case. Rather, the issue in *Cruz* was "whether [the rule of *Bruton v. United States*, 391 U.S. 123 (1968),] applies where the defendant's own confession, corroborating that of his codefendant, is introduced against him." *Cruz*, 481 U.S. at 188. The narrow holding in *Cruz* was that

> where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, . . . the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him.

*Id.* at 193. This holding goes to whether a Sixth Amendment violation occurred as an initial matter, not to whether the constitutional error was harmless beyond a reasonable doubt.

In spite of its limited holding, Rahim persists that *Cruz* stands for the proposition that a defendant's confession which corroborates a codefendant's hearsay confession and thus "interlocks" with that confession, cannot render the admission of the codefendant's hearsay confession at defendant's trial harmless error, because "interlocking" confessions are "devastating" to the defendant. *See* Pet. for Cert. at 21 (citing *Cruz*, 481 U.S. at 192). Rahim argues that *Cruz* "directly conflicts" with the court of appeals's harmless error holding, which was that the record as a whole showed that the admission of Vivanco's out-of-court confession was harmless error beyond a reasonable doubt. Pet. App. at 6a. Rahim's argument, however, misses the mark.

*Cruz* addressed the "devastating" practical effect that "interlocking" confessions may have on the defendant's case in the context of revisiting the Court's plurality opinion in *Parker v. Randolph*, 442 U.S. 62 (1979), which held that when a defendant has himself confessed, "[his] case has already been devastated" and, accordingly, no Sixth Amendment violation occurs by admitting a

codefendant's hearsay confession against the defendant. 481 U.S. at 191 (citing and quoting *Parker*, 442 U.S. at 75 n.7). *Cruz* rejected the *Parker* plurality's holding and, instead, adopted the approach espoused by Justice Blackmun in his concurrence in *Parker*, which was that "introduction of the defendant's own interlocking confession might, in some cases, render the violation of the Confrontation Clause harmless, but could not cause introduction of the nontestifying codefendant's confession not to constitute a violation." *Id.* (citing *Parker*, 442 U.S. at 77-80 (Blackmun, J., concurring in part and concurring in judgment)).[3]

Importantly, and what Rahim fails to mention, in *Cruz*, the Court emphasized that

> [q]uite obviously, what the "interlocking" nature of the codefendant's confession pertains to *is not its harmfulness* but rather its reliability: If it confirms essentially the same facts as the defendant's own confession it is more likely to be true. Its reliability, however, may be relevant to whether the confession should (despite the lack of opportunity for cross-examination) be admitted as evidence against the defendant, . . . but cannot conceivably be relevant to whether, assuming it cannot be admitted, the jury is likely to obey the instruction to disregard it, or the jury's failure to obey is likely to be inconsequential.

*Id.* at 192-93 (emphasis added and citation omitted). The Court went on to point out that the defendant's interlocking confession may also be considered by courts of appeals in assessing whether

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[3] In *Parker*, "Justice Blackmun alone went on to find that the interlocking confession [made] the error harmless . . . thereby producing a majority affirmance of the convictions." *Cruz*, 481 U.S. at 191 (citing *Parker*, 442 U.S. at 80-81).

any Confrontation Clause violation was harmless error beyond a reasonable doubt. *Id.* at 194.

Thus, the harmless error rule of *Harrington v. California*, 395 U.S. 250 (1969), was not diminished by the Court's decision in *Cruz*. On the contrary, the Court indirectly acknowledged that the scope of harmless error analysis for Confrontation Clause purposes is more expansive than the analysis of whether a Confrontation Clause violation exists as an initial matter. Accordingly, because the court of appeals's harmless error holding does not conflict with the Court's holding in *Cruz*, Rahim's petition should be denied.

**B. The Court of Appeals Correctly Held that Admission of Vivanco's Out-of-Court Confession Was Harmless Error Beyond a Reasonable Doubt.**

Rahim mistakenly argues that the court of appeals erred in admitting Vivanco's out-of-court confession and that the error was not harmless beyond a reasonable doubt. *See* Pet. for Cert. at 21. In *Chapman v. California*, 386 U.S. 18 (1967), the Court fashioned a harmless error rule and held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24. In deciding how to approach harmless error analysis, the Court cautioned that too much emphasis can be placed on the presence of "overwhelming evidence" of guilt and stated that it preferred the approach taken by the Court in *Fahy v. Connecticut*, 375 U.S. 85 (1963), in which the Court said: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman*, 386 U.S. at 23 (quoting *Fahy*, 375 U.S. at 86-87).

*Chapman*, which involved violations of the Fifth and Fourteenth Amendments, was reaffirmed and extended to Sixth Amendment Confrontation Clause violations in *Harrington v. California*, 395 U.S. 250, 254 (1969). In that case, the Court rejected the claim that

the admission into evidence of a statement made by a nontestifying codefendant, in violation of *Bruton v. United States*, 391 U.S. 123 (1968), can never be harmless. *Harrington*, 395 U.S. at 254. Based on its review of the record, the Court concluded that the wrongfully admitted evidence was cumulative and that the untainted proof of the defendant's guilt was "overwhelming[ly]" against the defendant and, therefore, was harmless beyond a reasonable doubt. *See id.*

The Court has expressly reaffirmed *Harrington* on more than one occasion. *See, e.g., Brown v. United States*, 411 U.S. 223, 231 (1973) ("In this case, as in *Harrington* . . . , the independent evidence 'is so overwhelming that unless we say that no violation of *Bruton* can constitute harmless error, we must leave this . . . conviction undisturbed.'"); *Schneble v. Florida*, 405 U.S. 427, 431 (1972) ("Not only is the independent evidence of guilt here overwhelming, as in *Harrington*, but the allegedly inadmissible statements . . . at most tended to corroborate certain details of petitioner's comprehensive confession.").

In *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), the Court held that the Supreme Court of Delaware wrongfully declined to consider whether the harmless error rule validated a trial court's ruling improperly restricting defense counsel's cross-examination that was designed to show bias on the part of a prosecution witness. *Id.* at 674. In trying "to blunt the force of *Harrington*," Delaware argued *inter alia* that the Confrontation Clause error in that case involved the *exclusion* of evidence which was analytically distinct from that of *Harrington*, which involved the erroneous *admission* of harmless testimony. *Id.* at 683. The Court rejected the distinction, saying that *Harrington* could not be "so easily dispatched," because in both cases the defendants were being denied an opportunity to cast doubt on the testimony of an adverse witness. *Id.*

> In both cases the prosecution was thus able to introduce evidence that was not subject to constitutionally adequate

> cross-examination. And in both cases the reviewing court should be able to decide whether the not-fully-impeached evidence might have affected the reliability of the factfinding process at trial.

*Id.* at 684. Thus, the Court went on to state:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error is harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

*Id.*

In this case, the court of appeals assumed the validity of Rahim's complaints concerned alleged Confrontation Clause violations, and recognized that it would be required to reverse his conviction unless it could be said that any error was harmless beyond a reasonable doubt. *See* Pet. App. at 5a. The court applied the proper standard of review, based on *Harrington*, and then reviewed the record and the same facts set forth above. Pet. App. at 2a-5a. Based on that record, the court correctly held that the alleged constitutional error was harmless beyond a reasonable doubt. *See* Pet. App. at 5a-7a.

It is readily apparent that Vivanco's confession was unimportant to the prosecution's case. Vivanco's confession was cumulative of the live trial testimony, which, standing alone, gave

the prosecution a strong case and amply supported the jury's guilty verdict. The live testimony at Rahim's trial established his involvement in hiring and paying Cabrera and Vivanco to murder Hassan. Cross-examination of the prosecution's witnesses was permitted on all material points. The testimony went largely uncontradicted.[4] The testimony of Hardman and DeJean is particularly compelling. Rahim's statements to these men constituted admissions by Rahim that he had hired and paid Cabrera and Vivanco to murder Hassan. The testimony of all of the prosecution's witnesses, taken together, established a strong case against Rahim linking him directly to the murder of Hassan.

Of course, the reviewing court does not know the jurors who sat on this case. The reviewing court's judgment must be based on its own reading of the record and the probable impact that Vivanco's confession had on the minds of the average juror. *See Harrington*, 395 U.S. at 254. Based on this record, and the overwhelming evidence of Rahim's guilt, the court of appeals correctly determined that Vivanco's confession was not necessary for the jury to find Rahim guilty of capital murder.

Indeed, the jury may have given Vivanco's confession no weight whatsoever. Defense counsel was permitted to impeach Vivanco's confession, and the trial court permitted Rahim to introduce a prior inconsistent statement made by Vivanco to police, in which he denied any involvement in the shooting. R. 616-17, 857. Rahim also was permitted to read Vivanco's testimony from his own trial, in which he maintained that he was coerced into making the confession and that it was untrue. R. 631-47.

Defense counsel did a thorough job impeaching Vivanco's confession. It cannot be said, as was the case in *Van Arsdall*, that

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[4] In defense counsel's closing argument, he summed up Rahim's defense by attacking the credibility of prosecution witnesses. R. 684-705.

the prosecution was able to introduce evidence that was not subject to impeachment by defense counsel. Rather than supporting Rahim's argument that the Confrontation Clause violation was harmful error, the fact that Vivanco's confession was so thoroughly impeached actually supports the conclusion that the jury gave it little or no weight, and that it did not contribute to Rahim's conviction.

Accordingly, there can be no doubt that based on this record, the court of appeals employed the proper standard of review and that the admission of Vivanco's confession was harmless error beyond a reasonable doubt. Rahim's true disagreement with the court of appeals's opinion concerns its interpretation of the facts, not its rendition or interpretation of the law. Rahim's petition should be denied.

## CONCLUSION

For the reasons stated, Respondent respectfully requests that Rahim's petition for writ of certiorari be denied.

Respectfully submitted,

JOHN CORNYN
Attorney General of Texas

ANDY TAYLOR
First Assistant Attorney General

SHANE PHELPS
Deputy Attorney General for Criminal Justice

GREGORY S. COLEMAN
Solicitor General
*Counsel of Record*

PHILIP A. LIONBERGER
Assistant Solicitor General

Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1824

COUNSEL FOR RESPONDENT